Montgomery County Chapter
American Civil Liberties Union of Maryland

Representing five thousand members in Montgomery County

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Bill 35-11, Offenses-Loitering or Prowling-Established
Recommend withdrawal.

Chapter Board

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Usual meeting date is the 4th Wednesday of the month (except in July, August, and December, at The Cedar Lane Unitarian Church 9601 Cedar Lane Bethesda Maryland, at 7:30 p.m. Call to confirm 301-229-0470

There are serious problems with bill 35-11.

It does not let people know what is prohibited. Instead, it lets proprietors and police decide that on the spur of the moment.

Bill 35-11 creates "thought crimes". It requires the police to be clairvoyant and guess what's in the mind of the loiterer. Such vagueness leads to arbitrary and discriminatory enforcement. As a result, it criminalizes innocent conduct.[1]

Whatever happened to probable cause?

What happened to criminal intent?

The bill has no probable cause requirement. It doesn't even mention intent. The Annapolis loitering law was thrown out in 2001 by the United States District Court for lack of criminal intent.

The bill says: "circumstances that warrant alarm". "Alarm" is undefined. This can result in racial profiling. Do I become a criminal because someone is alarmed at my language, or race, or dress?

The bill allows arrests on "immediate concern for the safety of persons or property". But there are no guidelines on what specific circumstances or conduct warrant such concern.

Bill 35-11 gives quasi law-enforcement powers to private establishments. This invites discrimination in violation of federal, state, and county public accommodations civil rights laws.

The bill does give people a chance to identify and explain themselves. But it gives the officer no clarity on what is a satisfactory explanation. And criminalizing the failure to convince an officer of one's innocence stands the 5th amendment on its head. The bill comes dangerously close to criminalizing refusal to identify oneself to a police officer, which would be unconstitutional, and was rejected by the Md General Assembly in 2005 (HB 578).

(over)

Sufficient Criminal Statutes are in place, such as "disturbing the peace" and "disorderly conduct" laws for the circumstances that inspired this bill.

We tried really hard to think positive and come up with helpful suggestions. But the only one that survived analysis is to urge the authors to withdraw the bill.

I thank you for your attention and will try to answer any questions you may have.

Mike Mage, Co-Chair
Montgomery County Chapter, ACLU of Maryland

[1]For example, during the term of the former mayor, now governor, the Baltimore loitering law was one of the laws used by police to make thousands of arrests each year of people, mostly African-American, for wholly innocent activities, resulting in successful litigation against the city to rectify this wrong. *Maryland State Conference of NAACP Branches v. Baltimore City Police Department* (D. Md 2010).

Thomas Nephew, Montgomery County Civil Rights Coalition

Thanks for this chance to speak against the loitering/"prowling" bill 35-11. I question its constitutionality, necessity, and likely results.

The October 25 memo about this bill cites cases seeming to show laws based on the same Model Penal Code ordinance have withstood scrutiny around the country.

But in two of those cases -- *BJ v. State* (of Florida) and *O'Hara v. State* (of Georgia) -- the court didn't really rule on the law's validity, it just decided that the facts of the case fit the charge. Similarly, *Watts v. State* merely found that a potentially important precedent (*Kolender v. Lawson*) was inappropriate for the case.

Bell v. State does uphold a Georgia law like 35-11, and so do cases from Florida (*State v. Ecker*) and Wisconsin (*City of Milwaukee v. Nelson*). None of these decisions were unanimous; moreover, in the Florida and Wisconsin cases, very strong dissents were lodged on grounds I'll echo below. More importantly, laws based on the same loitering/"prowling" law were found unconstitutional in Idaho (*State v. Bitt*), Oregon (*Portland v. White*), and Washington (*Bellevue v. Miller*).

The fact that judicial opinions on the matter are about evenly divided – with Southern states finding loitering laws constitutional, and Western states not – is itself instructive. One of the main standards for loitering laws is whether they're "void for vagueness" – sometimes defined as *"so obscure that men of common intelligence must necessarily guess at its meaning."*

And 35-11 is full of language to guess about: "in a manner not usual", "justifiable and reasonable alarm or immediate concern", "dispel alarm," "explain his or her conduct". In the real world, a dozen officers will interpret these words in a dozen different ways.

My point is that if justices of ***un***common intelligence have trouble agreeing whether this law is vague, how much more puzzled the rest of us will be what to expect.

The sponsor's failure to show a need for this bill in his October 19 memo -- which points to declining crime and youth crime rates in the county, and success in Downtown Silver Spring by assigning additional police – only increases my questions about this bill.

The vagueness objection I've talked about touches on a concern I've shared before -- that this law gives too much scope to overzealous or otherwise mistaken police to stop citizens.

Another major objection to this bill is that it smuggles "stop and identify" procedure into our county and state. At least the regrettable 2004 *Hiibel* ruling by the Rehnquist Court -- that a person could be compelled to identify themselves to a policeman -- was based on reasonable suspicion of involvement in a crime. But this law compels it for mere *concern* about *future* wrongdoing. Even under Henry VIII, Thomas More had the right to "stand on his silence"; it's strange and sad to give that up 600 years later because of isolated incidents.

An August story in the Post told of 15 young, mostly black men were stopped and searched in Silver Spring, and some had their tattoos photographed -- on nothing but a hunch. They turned out to be doing nothing wrong. It was an unjustified humiliation that just happened to be

reported; I think we can expect even more like it with this vague law encouraging stops for highly subjective reasons.

Americans expect our legislators to only craft unambiguous, absolutely necessary laws that don't infringe on our rights. So I hope you won't pass this one.